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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHNNY MAC BROWN,
Petitioner,
v.
AMERICAN HONDA MOTOR CO., INC
and JERRY FELTY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALLAN IDES
Counsel of Record for Petitioner
WASHINGTON AND LEE
SCHOOL OF LAW
Lexington, Virginia 24450
(703) 463-8538

THOMAS B. BRANCH, III
CHARLES D. GANZ
FRANK O. BROWN, JR.
Counsel for Petitioner
BRANCH, PIKE, GANZ &
O'CALLAGHAN
15th Floor, Two Midtown Plaza
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309-3209
(404) 898-8000

Tower Printing Company, 2 Peachtree St., Atlanta, Georgia 30383 (404) 659-4080

QUESTION PRESENTED

To what extent may a federal district court weigh conflicting evidence and consider and weigh potential inferences drawn from circumstantial evidence in a summary judgment proceeding in which the critical issue is illicit or discriminatory intent? More specifically, did the District Court here err in granting summary judgment for the defendants in an action under 42 U.S.C. § 1981 in the face of conflicting circumstantial evidence regarding defendants' intent to discriminate on the basis of race?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 939 F.2d 946 (11th Cir. 1991); the decision of the District Court is unreported. Copies of both decisions are appended to this petition.

JURISDICTION

The final judgment of the court of appeals was entered on August 23, 1991. The United States Supreme Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES

1. 42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Fed. R. Civ. P. 56(c)

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

I. INTRODUCTION

The single question presented in this case involves the scope of a district court's discretion to grant summary judgment in a civil rights case requiring proof of discriminatory intent. The issue is particularly important since the question of discriminatory intent is often clouded by potentially conflicting inferences drawn from circum-

stantial evidence. The problem is further complicated by the inherent difficulty of establishing discriminatory or illicit intent.

The District Court here concluded that despite conflicting inferences drawn from circumstantial evidence an award of summary judgment against plaintiff was appropriate. The court apparently interpreted this Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as establishing a preference in favor of summary judgment. The Court of Appeals affirmed despite its explicit recognition that "the facts of this case present a very close question . . . ." 939 F.2d at 948. The affirmance appears to be part of a trend toward a more liberal use of the summary judgment procedure; as such, it expands the circumstances under which summary judgment may be granted, lending new and confusing meaning to the phrase, genuine issue of material fact. Most importantly, the Court of Appeals decision presents this Court with an opportunity to address and set standards for summary judgment in cases in which a requisite finding of discriminatory or illicit intent requires some consideration of conflicting evidence generating conflicting inferences.

II. STATEMENT OF FACTS

Petitioner Johnny Mac Brown, a black businessman, was the owner of a successful General Motors dealership in Warner Robins, Georgia during the period pertinent to this litigation. (R7-50). In 1984, he learned that the American Honda Motor Company planned to open a Honda dealership in that area. Brown advised Honda of

his interest and later applied for the dealership. (R12-19-R12-21). A Honda representative, who did not know Brown was black, came to Warner Robins and visited with Brown and two other applicants, both of whom were white. (R9-21; R12-19-R12-21; R10-164). Although the Honda Automobile Dealer Appointment Manual ("Manual") provided that applicants were to be interviewed, the representative admitted that he did not interview Brown. Indeed, the visit with Brown was perfunctory, lasting between five and ten minutes. (P18; p. 5; R8-144; R9-88; R10-155; R10-109; R12-22). After the visit to Warner Robins, the representative wrote a memorandum that commented favorably on the other two applicants and omitted any comment regarding Brown other than that he had been contacted. (P-16).

Brown had fifteen years experience with sales and business ownership when he applied for the Honda dealership. (R 7-40-7-43). Seven of these fifteen years had been in the automobile sales area, during which time Brown compiled an impressive record. (R 7-43-7-50, P-21). Brown worked from 1977 until 1980 as a salesman for an Atlanta GM dealership. During his time there he was consistently ranked among the top three of nineteen salesmen. (R 7-43). Brown also completed special training to prepare him to open and run his own dealership. (R 8-44). In 1980, Brown opened his own GM dealership in Warner Robins, which turned a profit every year from its opening despite initially poor economic conditions, a low volume of existing GM products in the area upon which to perform warranty repairs and a lack of product identification among area residents. (P-21, R7-51).

Brown's application for the Honda dealership included his personal resume, a sketch of the proposed new

facility, numerous letters of reference as well as newspaper and magazine articles showing that Brown's GM dealership was the 70th largest black-owned business in the United States. The application also discussed the extensive financial commitment Brown was prepared to make for the Honda dealership. (P-3).

At about this same time, another Honda representative working out of the same office informed Phillip Hughes, who is white, that Honda planned to open a dealership in Warner Robins. (R8-38). Hughes owned Honda and BMW dealerships in Athens, Georgia. (R8-38-R8-92). Hughes had never expressed any interest in the Warner Robins dealership and at the time he was approached he had no such interest. (R8-37; R8-125; R8-38). Hughes had no knowledge of the Warner Robins area. (R8-38). Eventually, Hughes changed his mind and requested an application for the Warner Robins dealership.[1] (R8-38-R8-39). Hughes was provided the Honda Automobile Dealer Sales Agreement Minimum Requirements form. (P-17; R8-40). Among other things, the form provided information regarding working capital, business net worth, floor plan, building size and composition, displays, land area, parking, number of employees and, most importantly, information on the market area potential, i.e., the number of vehicles Honda expected to be sold in a given period. (P-15; P-15A). Although Brown had requested such information from the Honda representatives, it was not provided to him. The information

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[1] Phillip Hughes applied for the dealership along with his brother, Ashley Hughes, who was employed by Phillip in one of the Athens dealerships. For convenience, the Hughes brothers are referred to in the singular.

was provided to one of the other white applicants. (R7-86; R7-89; R7-94-R7-95; R7-104-R7-107).

Once the four applications -- Brown, Hughes and the two others from the Warner Robins area -- were received, the next step in the selection process should have been the review of all four applications at the district and zone level. (P-5; P-17; P-15; P-16). However, prior to the date Brown's application was reviewed, a decision had been made to recommend Hughes for the dealership. The existence of the pre-review decision is established through documents prepared by Honda personnel prior to the date on which Brown's application was supposedly reviewed. (R9-44; R9-46; R9-49-R9-50; R9-68; R9-77-R9-78). The evidence also established that the *post-decision* review provided Brown did not conform to company practices, further suggesting that the review was a mere formality. (R9-15; P-17; R-18 [p.5]). For example, contrary to normal procedures, the Honda representative who visited Brown did not participate in the review nor did that representative provide the review process with any information regarding Brown. (R9-9-R9-15; R12-24; R12-36-R12-38).

The decision to recommend Hughes for the dealership was forwarded to the national sales manager and regional manager for Honda. (P-17; D-51; R8-80). The accompanying memorandum praises the Hughes application and makes no specific mention of Brown. The memorandum does state, "Attached also are resumes and applications from *two local dealers* who were *interviewed* . . . ." Since the national sales manager never saw Brown's application until after the final decision was made favoring Hughes and since according to Honda's evidence Brown was never interviewed, it is reasonable to infer that the "two local dealers" referred to in the memo-

randum were the other white Warner Robins applicants. (R9-168).

Honda admits that Brown met Honda's requirements for the dealership and that in many ways Brown's application was superior to that submitted by Hughes. (R9-67; R9-68; R10-49; Felty Dep. p.111). Without going into minute detail, a comparison of the applications establishes that Brown, unlike Hughes, was familiar with the region, that Brown proposed working capital of $300,000 as compared to $150,000 by Hughes, that Brown's proposed funds for a floor plan exceeded the Hughes' proposal by over $150,000, and Brown's net worth was twice that of Hughes. (R7-47-R7-77; R8-74; R8-109-R8-110; R8-87; R8-38; P15; P15A; P-3; R9-62; R9-92; P-5). Honda agreed that in the above regards, the Brown application was superior to the Hughes application. (Felty Dep. p. 139; R9-62; R9-92; R9-90). Nonetheless, the contract was awarded to Hughes.

Honda offered two reasons for favoring the Hughes application. First, according to Honda, Hughes agreed to operate an exclusive Honda dealership in Warner Robins. The evidence established, however, that both parties planned to operate an "exclusive" dealership as that term was defined in the Manual -- that definition required only that the Honda sales and activities occur in a physical facility separated from the dealer's other lines. Also, even if "exclusive" were narrowly defined as selling only Honda vehicles within the geographic area, there was simply no evidence that Hughes had made any such commitment in his application or otherwise. (R9-32; R9-34; P-19; P-18).

The second reason offered for the choice of Hughes was that Hughes was an experienced Honda dealer. The Manual, however, does not suggest in any manner that

prior experience as a Honda dealer is an appropriate criterion. (P-18). Honda's representatives admitted that in the application process, non-Honda dealers stand on the same footing as Honda dealers. (R10-203; Felty Dep. p. 169; R9-175; Phil Hughes Dep. p. 134). Moreover, the Hughes dealership was not going to be managed by Phil Hughes, the experienced dealer, but by his brother, Ashley. (R9-107; R8-77; R9-97). The evidence also established that an experienced automobile dealer such as Brown would have no difficulty learning and adhering to Honda's dealership guidelines. (R12-42-R12-43).

Honda's decision to deny Brown's application must be viewed against the entirely white landscape of the American Honda Motor Company. None of the Honda representatives at the district, zone or national level is black. (R9-158). Likewise, none of the persons employed by Honda in marketing representation is black. (R8-156-R9-157). None of the individuals involved in the selection of the dealership was black. (R9-83). Out of a total of approximately 860 Honda dealers in the United States, only two are black and only one of them obtained the dealership from Honda. The two black dealers are located in Chicago and Detroit, cities with majority black populations. (R7-205-R7-210; R8-15). Thus .0116% of all Honda dealers selected by Honda are black. None of the 88 dealers in the zone in which Warner Robins is located is black.

Information regarding the availability of new Honda dealerships is, by conscious design, disseminated by word of mouth only. (R8-90; R9-99). Since those who are initially aware of the new dealerships and therefore in a position to pass along information by word of mouth are all Honda employees or representatives, virtually all of

whom are white, blacks are rarely aware of the availability of new dealerships.

Honda takes no affirmative steps to include blacks as dealers and evidence established that Honda actually discourages blacks from applying for Honda dealerships. For example, Gregory Baranco, another successful black dealer, who operated a Pontiac dealership in the Atlanta area, tried repeatedly to obtain an application for a dealership in Gwinnett County. (R7-193-R7-205). He was told by the same individual who urged Hughes to apply for the Warner Robins dealership that nothing was available. (R7-201-R7-202; P-20). Shortly thereafter, the Gwinnett County Honda dealership opened with a white dealer. (R7-204-R7-205).

III. PROCEEDINGS BELOW

On February 14, 1985, Brown filed suit against the American Honda Motor Company, Inc. and Jerry Felty, the zone manager for American Honda, claiming a violation of his civil rights under 42 U.S.C. § 1981. The District Court had jurisdiction over this matter under 28 U.S.C. §§ 1331 & 1343(4). Brown sought a permanent injunction and damages. (R1-1). Shortly after Brown filed the complaint, Hughes intervened, seeking a declaratory judgment acknowledging Hughes' right to the dealership contract. (R1-11). At the time of the intervention, Hughes had already made substantial investments in good faith reliance on his contract with Honda. In addition, there was no allegation that Hughes had in any manner participated in the racial discrimination charged against Honda and Felty.

The District Court bifurcated the equitable and declaratory claims from the action for damages and held a

hearing on the two former claims. (R7-R12). The District Court expressly reserved Brown's right to a jury trial on his § 1981 claim for damages. (R3-68). After holding an evidentiary hearing on the equitable and declaratory claims, the trial court, in March of 1986, denied Brown's request for an injunction and upheld Hughes' right to the dealership. The District Court gave three alternative grounds for its decision: 1) after a weighing of the evidence, the District Court concluded that Brown had not established intentional discrimination by a preponderance of the evidence; 2) Hughes' right to the dealership had vested regardless of any illicit action taken by Honda since Hughes had made substantial investments in good faith reliance on the contract with Honda; and 3) Brown's request for a permanent injunction ran afoul of the doctrine of laches.

Discovery between Brown and the remaining defendants, Honda and Felty, continued through June 1, 1987. In March 1988, defendants moved for leave to file an untimely motion for summary judgment and the District Court granted that motion on June 12, 1988.[2] The motion for summary judgment was heard by the District Court on September 12, 1988, and a judgment granting the motion was entered on April 24, 1990. The essence of the District Court's holding was that although there was conflicting evidence on the question of intent to discriminate, summary judgment for defendants was appropriate since defendants' reasons for choosing the Hughes application

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[2] The motion for summary judgment was not based upon findings in the prior equitable proceeding. Both the trial court and the appellate court recognized that although evidence from that proceeding could be considered, it would be inappropriate to rely on the actual findings. 939 F.2d at 950-51.

were somehow more convincing than the counter-evidence suggesting that those reasons were pretext. Memorandum Opinion at 14 (listing evidence on both sides of the controversy and concluding without explanation that defendants' evidence was more convincing).

The Court of Appeals affirmed. 939 F.2d 946. In so doing, it upheld the trial court's implicit finding that defendants' proffered reasons for choosing Hughes (experience and exclusive dealership) were not pretexts. The court recognized that "the facts of this case present a very close question" and then proceeded to examine the facts to determine if Brown had proved his case of racial discrimination. *Id.* at 948. The court examined the evidence, somewhat selectively, and explained away potential inferences of racial discrimination by suggesting more benign interpretations of the evidence. *Id.* at 951-52. Each piece of evidence was treated separately, discounted and then placed to the side. Similarly, despite the "ominous hue" created by Brown's evidence of disproportionate impact, the court held that such evidence was irrelevant, ignoring the generally accepted principle that although disproportionate impact, standing alone, does not establish intent, disproportionate impact does present circumstantial evidence of intent. *Id.* at 953. Overall, the composite impact of the evidence was ignored. The Court of Appeals, having put a benign cast on all potential inferences, concluded that Brown failed to prove that defendants' reasons were pretext. It held that a trial judge may grant summary judgment to the defendants in a § 1981 case "unless the plaintiff satisfies the ultimate burden of persuasion by demonstrating that the defendant relied on race in making its decision." *Id.* at 953. In so doing, the

court seemed to confuse the judicial role on summary judgment with the role of a fact finder after a trial on the merits.

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN ORDER TO DEVELOP STANDARDS FOR SUMMARY JUDGMENT PROCEEDINGS INVOLVING CIRCUMSTANTIAL EVIDENCE OF DISCRIMINATORY INTENT

Federal Rule of Civil Procedure 56(c) provides that a trial court may grant summary judgment for the movant "if the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In the wake of this Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), courts and commentators have exhibited some concern over the proper standard to be applied in determining whether a particular dispute involves a genuine issue of material fact.[3] There is a sense that the Court has invited a liberal application of summary judgment procedures; the extent of that liberality, however, remains to be discovered. As the present case demonstrates, the standard is particularly elusive in the context of cases in which mental state is at issue. The temptation to resolve conflicting inferences is great.

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[3] Commentators have noted the concern expressed by the *Anderson* dissenters over exactly how courts should apply the summary judgment standard in *Anderson*. *See* C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2730 (Supp. 1991). In fact, possible

The decisions below present this Court with an opportunity to provide some much needed guidance. The issue is cleanly put: to what extent may a trial court weigh conflicting evidence and inferences in a summary judgment proceeding? Certainly if the District Court did misperceive the scope of its authority under Rule 56(c), the present case presents an ideal tool to sketch the boundaries of the trial court's function on summary judgment. The *Celotex* trilogy suggested wide possibilities for future applications of summary judgment; the Court now may wish to place some articulable limits on the breadth of those possibilities.

A. The District Court's Grant of Summary Judgment was Error

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), a case with circumstantial evidence similar to that offered by Brown, the United States Supreme Court held that the plaintiff in an action under 42 U.S.C. § 1983 could raise a genuine issue of material fact about an alleged conspiracy to violate civil rights with purely circumstantial evidence. In *Adickes*, the plaintiff, a schoolteacher, brought a § 1983

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problems with summary judgment in cases involving mental state were evident before the *Celotex* trilogy was decided. Sonnenshein, *State of Mind and Credibility In the Summary Judgment Context: A Better Approach*, 78 N.W. U. L.Rev. 774, 795 (1983). A. post-trilogy commentator has argued that *Anderson* "removed from the jury one of its traditional roles in litigation -- to interpret conduct and decide whether it was `reasonable', `negligent', `reckless', `intentional', `indifferent', `fraudulent', `knowingly false', and the myriad of other fact interpretations that traditionally have been reserved to the jury pursuant to the seventh amendment and traditional federal court practice." Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.Rev. 95, 115 (1988). Just how these changes are to be implemented by the courts remains uncertain.

action against the owner of a lunch counter at which she was arrested by local police. The police arrested the plaintiff shortly after a lunch counter employee refused to serve her because she was sitting with a group of black students. *Id.* at 149.

The plaintiff's § 1983 claim against the owner of the lunch counter was premised on an alleged conspiracy to deprive the plaintiff of her civil rights between the business (or one of its employees) and the local police. *Id.* at 152. The plaintiff's conspiracy theory rested entirely upon circumstantial evidence. The manager of the lunch counter testified in his deposition that he had not communicated with the police and had ordered a waitress to refuse to serve the plaintiff because he feared the situation might cause a riot. *Id.* at 153-54. The arresting officers swore in affidavits that the manager had not contacted them. *Id.* at 154. The plaintiff also conceded in her own deposition that she had no actual knowledge of any communication between any Kress employee and the police. *Id.*

In support of her conspiracy theory, the plaintiff offered the testimony of one of her students, who stated that the police officer who eventually arrested the plaintiff had been in the lunchroom when the waitress refused to serve the plaintiff. *Id.* at 157 n.13. According to the student, the plaintiff could not have seen the officer because plaintiff's back was to him. A Kress employee made a statement to the same effect. *Id.* The plaintiff argued that this evidence raised a plausible inference of a conspiracy. The district court granted the defendant's motion for summary judgment and the appellate court affirmed, each court finding that the plaintiff had failed to raise a genuine issue of material fact.

The Supreme Court, however, reversed, reasoning that the circumstantial evidence, viewed in the light most favorable to the plaintiff, raised a genuine issue of material fact over the existence of a conspiracy. The Court concluded that if the policeman was present,

> it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a `meeting of the minds' and thus reached an understanding that petitioner should be refused service. Because [in a motion for summary judgment all inferences are drawn in a light most favorable to the nonmoving party], we think respondent's failure to show there was no policeman in the store requires reversal.

Id. at 158-59 (citations omitted).

Brown's opposition to the motion for summary judgment in the present case presents an even stronger basis for denying the motion than was presented by the plaintiff in *Adickes*. The circumstantial evidence from which inferences of intent to discriminate could be drawn was more substantial, both qualitatively and quantitatively, than the morsel of evidence deemed sufficient to overcome the motion for summary judgment in *Adickes*. Specifically, Brown offered the following evidence from which a jury could reasonably infer that Honda's reasons for denying the contract were a pretext for racial discrimination: Honda's substantial deviations from its own guidelines in processing Brown's application, Honda's failure to interview Brown, the failure of company representatives to forward Brown's application in a timely fashion, Honda's failure to contact any of Brown's refer-

ences, Honda's failure to review Brown's application prior to the decision to award the dealership to Hughes, the cursory *post-decision* review accorded Brown's application, the preferential treatment given white applicants in terms of information sharing, the preferential treatment given Hughes in terms of assistance with the application, Honda's overwhelmingly disproportionate lack of black dealers and black employees, Honda's word-of-mouth system of announcing dealerships further exacerbating the racial imbalance, evidence that Honda had recently discriminated against other black dealers in the area, evidence of Brown's superior qualifications, etc. In addition, there was specific evidence suggesting that the two reasons given by Honda for selecting Hughes -- a preference for experienced Honda dealers and a promise to sell only Honda automobiles -- were, in fact, post-hoc rationalizations: first, the Manual provides no preference for existing Honda dealers and, in fact, Honda's own evidence suggests that Honda dealers get no such preference; second, the exclusive dealership definition relied upon by Honda was inconsistent with its own Manual, and, most importantly, there was conflicting evidence regarding the supposed commitment by Hughes to sell only Hondas in the Warner Robins area.[4] Surely, if an inference of conspiracy can be derived from the mere presence of the officer in the *Adickes* case, an inference of intent to discrimi-

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[4] It is important to note that although the Court of Appeals credited Honda's evidence on this point, there was conflicting evidence on whether Hughes had actually committed to sell only Hondas in the Warner Robins area. The appellate court completely ignored Brown's evidence to the contrary. This was but another example of the lower court in this case weighing the evidence and making explicit factual findings.

nate can be found in the abundance of circumstantial evidence presented by Brown.

The Court in *Adickes* viewed the evidence in a light most favorable to the non-moving party. Because of this, the Court did not weigh conflicting inferences or attempt to place a spin on the evidence that was contrary to the non-moving party's position. The Court simply viewed the evidence as a whole and concluded that one possible inference derived from that evidence supported plaintiff's theory of conspiracy. By way of contrast, the Court of Appeals here compartmentalized each piece of evidence, scrutinized it and either sanitized or trumped it with contrary inferences. A comparison of the two cases leads to only one conclusion: the *Adickes* Court left the ultimate fact determination to the jury; the District Court and the Court of Appeals here exercised that prerogative itself.

B. Standards for Summary Judgment under the Celotex Trilogy

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court provided new guidance regarding the scope of summary judgment. Of particular importance here is the *Anderson* decision. There the Court made it clear that the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." 477 U.S. at 247-48 (emphasis in original). Accordingly, a motion for summary judgment requires a trial court to make two independent inquiries into the materiality and the genuineness of the factual issues at

hand. *Id.* at 248. The substantive law drives the issue of materiality. The existence of factual issues that are irrelevant or unnecessary to resolve in order to ultimately dispose of the case will not allow the case to survive a motion for summary judgment.[5] *Id.*

Determination of a fact's genuineness, however, is more problematic. A fact is genuine only when sufficient evidence exists to support a jury verdict for the non-moving party. *Id.* at 249. That does not mean that a jury must find for the non-moving party, it means only that a reasonable juror could so find. In *Anderson*, the Court held that this determination must be made in light of the applicable evidentiary burden. The Court, however, was careful to note that the judge's use of the substantive burdens does not allow the judge to guess how a jury might decide a particular case. The judge's consideration of a summary judgment motion

> does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, *and the drawing of legitimate inferences from the facts* are jury functions, not those of a judge . . . The evidence of the non-movant is to be believed, *and all justifiable inferences* to be drawn in his favor.

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[5] There is no question but that intent to discriminate is a material fact in the context of a suit brought under 42 U.S.C. § 1981. Moreover, neither of the lower courts suggested that Brown had failed to produce any evidence of this material fact. Indeed, the weighing of the evidence by the courts below belies any such suggestion. Thus, this case is far removed from *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), in which the plaintiff failed to present any admissible evidence regarding a material element of her cause of action.

Id. at 255 (emphasis added). The *Anderson* Court's warning that the drawing of legitimate inferences from the facts remains the province of the jury indicates that the *Adickes* doctrine of allowing a case to go to the jury when multiple inferences are possible remains intact. In fact, the *Anderson* Court cited *Adickes* for the proposition that when the evidence leaves open any possible inference favorable and dispositive to the plaintiff's case, summary judgment is improper. *Id.* at 249 (citing *Adickes*, 389 U.S. at 158-59).

Admittedly, *Anderson* is not crystal clear with respect to the scope of the judicial function. The opinion suggests that a trial judge, in determining whether a genuine issue of material fact exists for trial, will have to screen the facts for what the judge believes are legitimate inferences. *Id.* at 249-50 (stating that summary judgment is proper when plaintiff's evidence is "merely colorable" or "not sufficiently probative"). The confusion inherent in exactly how to go about this process is shown, albeit inadvertently, in two potentially contradictory statements in *Anderson* regarding the trial judge's function at the summary judgment stage. First, the Court states that "the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial." *Id.* at 249. In the very next sentence, however, the Court states that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* The second statement, in light of the first, either begs the question of what standard a judge should use in deciding on existence of a factual issue because sufficiency of evidence is clearly a jury question, or invites

the judge to second guess the jury about sufficiency of evidence.

Thus, *Anderson* failed to articulate a clear standard for how far the trial judge may go when evaluating the evidence for a motion for summary judgment. Justice Rehnquist recognized the analytical problems inherent in the *Anderson* Court's summary judgment analysis when he noted that "the Court has created a standard that is different from the standard normally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases." *Id.* at 273. Similarly, Justice Brennan decried the impossibility of determining exactly what a "reasonable" jury might do. *Id.* at 259. Moreover, Justice Brennan also lamented *Anderson's* lack of guidance to lower courts:

> the Court, in my view, while instructing the trial judge to 'consider' heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a 'fair-minded' jury could 'reasonably' decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

Id. at 267. Indeed, the limits of the holding in *Anderson* are difficult to determine. Despite the Court's protestations to the contrary, if the *Anderson* holding is taken to its logical conclusion, that holding would entirely negate the need for juries in a wide range of (if not in all) civil cases; a court could merely determine whether a factual issue existed by viewing the evidence in light of the substantive evidentiary burden, and determining that no is-

sue of fact existed because the evidence was insufficient or did not allow inferences it considered plausible. That is precisely what the trial and appellate courts did here -- they decided that Brown had not proven his case.

The possible inferences presented by the evidence in this case were distinctly within the province of the jury. The trial judge here should have let the plaintiff develop his case at trial and allow the jury to determine what inferences the evidence could allow. *Adickes* would seem to be the controlling decision. Yet, the trial court went much further than permitted by the relatively clear *Adickes* standard. This case illustrates all too clearly the dangers inherent in applying the more amorphous standard articulated in *Anderson*. Both in result and in approach it is quite clear that the District Court and the Court of Appeals here exceeded their respective roles in resolving this case through a summary judgment proceeding. Both courts engaged in fact finding and, given the elastic nature of the *Anderson* standard, they may have done so based on a misreading of that case.

Given the fact that the decisions below run afoul of the principles announced and applied in *Adickes* and given the somewhat ambiguous standards articulated in *Anderson*, this case provides a perfect vehicle through which to provide guidance to lower courts with respect to the judge's role in assessing factual inferences in summary judgment proceedings.[6]

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[6] *Anderson* is not the only decision in the *Celotex* trilogy employing open-ended language. For example, Justice White's dissent in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), criticizes the Court for using "broad and confusing language" that invited trial courts to weigh the evidence in summary judgment

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant his Petition for a Writ of Certiorari.

Date: November 20, 1991

Respectfully submitted,

By:_____
Allan Ides
Counsel of Record
for Petitioner

Washington and Lee
School of Law
Lexington, Virginia 24450
(703) 463-8538

BRANCH, PIKE, GANZ & O'CALLAGHAN

By:_____
Thomas B. Branch, III

By:_____
Charles D. Ganz

By:_____
Frank O. Brown, Jr.
Counsel for Petitioner

15th Floor,
Two Midtown Plaza
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309-3209
(404) 898-8000

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cases involving anti-trust conspiracy. *Id.* at 600-602. The dissent was joined by Justices Brennan, Blackmun and Stevens.

APPENDICES

Appendix "A": August 23, 1991, Opinion of Eleventh Circuit

Appendix "B": April 24, 1990, Memorandum Opinion and Final Judgment of District Court

Appendix "C": September 18, 1991, Judgment of Eleventh Circuit

APPENDIX A

Johnny Mac BROWN, Plaintiff-Appellant,

v.

AMERICAN HONDA MOTOR COMPANY, INC., Jerry Felty, Defendants-Appellees,

Philip R. Hughes, Ashley D. Hughes, Hughes Auto Sales, Inc., Intervenors-Defendants.

No. 90-8487.

United States Court of Appeals,
Eleventh Circuit.

Aug. 23, 1991.

Rejected black applicant for automobile dealership sued manufacturer under § 1981. The United States District Court for the Northern District of Georgia, No. 1:85-cv-1582-HTW, Horace T. Ward, J., entered summary judgment for manufacturer. Applicant appealed. The Court of Appeals, Roney, Senior Circuit Judge, held that: (1) evidence supported finding that business reasons advanced by manufacturer were not pretext for intentional discrimination, and (2) court properly denied applicant's motion to reopen discovery.

Affirmed.

1. Federal Civil Procedure 2491.5

Despite general presumption against using summary judgment to resolve largely factual questions concerning discriminatory intent in § 1981 actions, it is possible for defendant to present such strong evidence of nondiscrimi

natory rationale that summary judgment is warranted. 42 U.S.C.A. § 1981.

2. Civil Rights 240(1)

In § 1981 actions, if defendant's proffer of credible, nondiscriminatory reasons for its actions is sufficiently probative, then plaintiff must come forward with specific evidence demonstrating that reasons given by defendant were pretext for discrimination. 42 U.S.C.A. § 1981.

3. Civil Rights 118

Rejected black applicant for automobile dealership failed to show that manufacturer awarded dealership to white applicant for racially discriminatory reasons, and thus, black applicant could not recover under § 1981; manufacturer offered legitimate, nondiscriminatory reasons for selecting white applicant, i.e., he was only applicant who had prior experience in sales and service of manufacturer's automobiles and he was only applicant who would exclusively sell manufacturer's automobiles, black applicant failed to show those reasons were pretextual, and, even though manufacturer's expressed preference for existing dealers did not appear in its manual, that practice affected two rejected white applicants in precisely same manner that it affected black applicant. 42 U.S.C.A. § 1981.

4. Civil Rights 118

Under § 1981, contract may be granted for good reason, bad reason, reason based on erroneous fact, or for no reason at all, as long it is not for discriminatory reason. 42 U.S.C.A. § 1981.

5. **Civil Rights 118**

In § 1981 action by rejected black applicant for automobile dealership, fact that of approximately 860 of defendant manufacturer's dealers nationwide, only two were black, did not demonstrate that reasons espoused by manufacturer for rejecting black applicant were not legitimate; there was no evidence of how many blacks had applied and failed, and no comparison of that number to success rate of equally qualified white applicants. 42 U.S.C.A. § 1981.

6. **Civil Rights 118**

In § 1981 action by rejected black applicant for automobile dealership, it was not sufficient for black applicant to show that defendant manufacturer was aware that particular practice of choosing dealers would have discriminatory impact; rather, black applicant was required to show that defendant chose policy for precisely that purpose. 42 U.S.C.A. § 1981.

7. **Civil Rights 242(1)**

To rebut prima facie case of discrimination shown by rejected black applicant for automobile dealership, defendant manufacturer was not required to demonstrate that individual selected for dealership was actually more qualified than black applicant, but rather, manufacturer was only required to show that it had legitimate nondiscriminatory reason for its action. 42 U.S.C.A. § 1981.

8. **Federal Civil Procedure 1271**

In § 1981 action against automobile manufacturer by rejected black applicant for dealership, court properly denied black applicant's motion to reopen discovery to make

inquiries into Equal Employment Opportunity Commission (EEOC) agreement with manufacturing component of defendant's operations; hiring practices used by related subsidiary involved in production and located in different state were not relevant to intent of separate corporation involved in sales and located in Georgia. 42 U.S.C.A. § 1981.

9. Federal Civil Procedure 1588

In § 1981 action by rejected black applicant for Georgia automobile dealership, district court properly denied black applicant's motion to compel production of information by manufacturer concerning all blacks who had communicated interest in becoming dealers, concerning all officers of the manufacturer who had been informed of present suit, and concerning all governmental or private organizations that had complained of discriminatory practices to manufacturer in past; it was not clear that nationwide practices were relevant. 42 U.S.C.A. § 1981.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

RONEY, Senior Circuit Judge:

Plaintiff Johnny Mac Brown brought suit under 42 U.S.C. § 1981 alleging that American Honda Motor Company (Honda) rejected his bid to obtain a Honda dealership in Warner Robins, Georgia, for racially discriminatory reasons. To succeed, plaintiff would have to show that Honda intentionally discriminated against him on the basis of race. *See General Bldg. Contractors Ass'n v.*

Pennsylvania, 458 U.S. 375, 389-91, 102 S.Ct. 3141, 3149-50, 73 L.Ed.2d 835 (1982). We affirm the summary judgment for defendants American Honda Motor Company, Inc. and Jerry Felty on the ground that the district court correctly concluded that the business reasons advanced by defendants for awarding the dealership to Hughes Auto Sales, Inc. were not a pretext for intentional discrimination against Brown because he was black.

Although the plaintiff asserts that this case is important to the developing law of discrimination claims asserted under section 1981, we believe the case involves nothing more than the application of established law, about which the parties do not disagree, to the individual facts of this case. Although the facts of this case present a very close question, it presents a situation which has been addressed by a host of other courts. *See, e.g., Williams v. City of Sioux Falls*, 846 F.2d 509 (8th Cir.1988) (black contractor alleged city violated § 1981 by denying his bid on basis of race); *Taylor v. City of St. Louis*, 702 F.2d 695 (8th Cir.1983) (black businesswoman maintained contract was denied on account of race); *T & S Service Assoc. v. Crenson*, 666 F.2d 722 (1st Cir.1981) (minority owned business did not receive contract and sued under § 1981); *Howard Security Services, Inc. v. Johns Hopkins Hospital*, 516 F.Supp. 508 (D.Md.1981) (same); *Scott v. Clark*, 436 F.Supp. 569 (D.Mo.1977) (black refuse collector sued under § 1981 alleging racial motive for failure to grant contract).

The triggering facts can be briefly stated. In early September of 1984, the plaintiff learned that Honda planned to open a new dealership in Warner Robins, Georgia. At that time, plaintiff owned and operated a General Motors dealership in Warner Robins and was anxious to expand his operations. Initially, he and two other white

individuals submitted applications to Honda. The other two applicants also had existing dealerships in the Warner Robins area. Honda then contacted one of its own dealers, Phil Hughes, who ran a Honda dealership 120 miles away in Athens, Georgia. Allegedly, Honda encouraged Hughes, who is white, to submit an application and actively assisted in his efforts to obtain the contract. Hughes eventually received approval from Honda to open the dealership.

The plaintiff brought suit seeking both equitable relief and damages. District Judge Horace T. Ward bifurcated the proceedings and denied plaintiff's request for a preliminary injunction after a full evidentiary hearing. After further discovery, the defendant filed a motion for summary judgment which was granted.

The district court found these undisputed facts: four applications were submitted to American Honda by persons seeking to become the American Honda franchisee for Warner Robins, Georgia. They were submitted by (1) plaintiff Johnny Mac Brown, (2) Philip and Ashley Hughes, (3) Dan G. Walton, and (4) Billy B. Butler. Johnny Mac Brown is black; Philip and Ashley Hughes, Dan G. Walter and Billy B. Butler are white. All of the applications met American Honda's minimum requirements. Of the four applicants, however, only the Hugheses had prior experience in the sales and service of Honda automobiles. In addition, only the Hugheses' application showed that they would sell exclusively Honda automobiles in the Warner Robins market. Philip and Ashley Hughes were chosen by American Honda to receive the American Honda franchise in Warner Robins.

Legal Standard

The plaintiff correctly notes that the basis for a federal race discrimination claim by a non-employee against a private company is under 42 U.S.C. § 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). Section 1981 provides that all citizens shall have the same right to "make and enforce contracts." The aim of the statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace. *Patterson*, at 176, 109 S.Ct. at 2372, 105 L.Ed.2d at 150. This right extends not only to interactions between citizens and government, but to wholly private business dealings as well. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609, 107 S.Ct. 2022-2026, 95 L.Ed.2d 582 (1987).

Section 1981 requires proof of *intentional* discrimination. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 391, 102 S.Ct. 3141, 3150, 73 L.Ed.2d 835 (1982); *Washington v. Davis*, 426 U.S. 229, 246-48, 96 S. Ct. 2040, 2050-52, 48 L.Ed.2d 597 (1976); *Baldwin v. Birmingham Board of Education*, 648 F.2d 950, 954 (5th Cir. Unit B March 19, 1981); *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1309 (5th Cir.1980). The Supreme Court has held that the test for intentional discrimination in suits under § 1981 is the same as the formulation used in Title VII discriminatory treatment causes. *Patterson*, 491 U.S. at 135-87, 109 S.Ct. at 2377-78, 105 L.Ed.2d at 156-57. Under the familiar *McDonnell Douglas/Burdine* framework, the court employs a three part test designed to determine the motivation of the defendant in taking the challenged action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Depart-*

ment of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

The initial burden rests with the plaintiff to demonstrate by a preponderance of the evidence a prima facie case of discrimination. *Id.* at 252-53, 101 S.Ct. at 1093-94. This burden is not onerous, *id.* at 253, 101 S.Ct. at 1094, and can be met by simply demonstrating that the plaintiff is a member of a minority group, that he submitted an application or bid which met the requirements for an available contract, that the application or bid was ultimately rejected, and that the contract was eventually given to an individual who is not a member of a protected class. *Patterson*, 491 U.S. at 187, 109 S.Ct. at 2378, 105 L.Ed.2d at 157; *Zaklama v. Mount Sinai Medical Center*, 842 F.2d 291, 293 (11th Cir.1988). Thereafter the defendant must come forward with evidence demonstrating legitimate, nondiscriminatory reasons for its conduct. *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094. It is important to note that the burden on the defendant is one of production not persuasion. *Id.* at 254-55, 101 S.Ct. at 1094-95; *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 618-19 (11th Cir.1983). Once the defendant satisfies this obligation, it is incumbent on the plaintiff to produce evidence suggesting that those reasons are merely a pretext, the real reason for the action having been based on race. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1093.

District Court's Application of the Legal Standard

Following *McDonnell Douglas* and its progeny, the district court would have denied summary judgment for defendant insofar as it challenged plaintiff's *prima facie* case. The plaintiff is a member of a minority group, his proposal met the specifications required, and the franchise

agreement was awarded to white applicants. The defendant does not argue that the court was incorrect in this determination.

[1,2] The district court held, however, that to withstand a defendant's motion for summary judgment, a plaintiff had to do more than establish a prima facie case and deny the credibility of defendant's witnesses. *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir.1986). Throughout the proceeding the burden of persuasion and the burden of proving intentional discrimination remains with the plaintiff. Accordingly, despite the general presumption against using summary judgment to resolve the largely factual questions concerning discriminatory intent, *Beard v. Annis*, 730 F.2d 741, 743 (11th Cir.1984), it is possible for the defendant to present such strong evidence of a nondiscriminatory rationale that summary judgment is warranted. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987). If the defendant's proffer of credible, nondiscriminatory reasons for its actions is sufficiently probative, then the plaintiff must come forward with specific evidence demonstrating that the reasons given by defendant were a pretext for discrimination. It does not appear from this record that the plaintiff has done that in this case.

The district court held that the two reasons articulated by defendants for not selecting either plaintiff's application or either of the other two applications were legitimate and nondiscriminatory. The case turns on whether these were the real reasons, or simply pretexts given for a decision that was actually based on race. On this point, not surprisingly, there is no direct evidence. As the plaintiff argues, seldom is there direct evidence of intentional racial discrimination. *Grigsby*, 821 F.2d at 595 (*McDonnell*

Douglas-Burdine test is designed to ease burdens on discrimination plaintiffs when direct evidence of discrimination is lacking).

The district court carefully examined the circumstantial evidence which plaintiff asserts demonstrates that these reasons are pretextual: differences in treatment between plaintiff and the Hugheses, defendants' failure to seriously consider plaintiff's application, selection of a less qualified white applicant over a more qualified minority applicant, deviations from the policy or practice of defendants' regarding new dealerships, statistical evidence, and an asserted lack of credibility in the reasons asserted by defendant. Partially relying on the fact that two white applicants, both of whom had filed applications that satisfied Honda's minimum requirements, also did not receive the dealership, the district court ruled that the plaintiff's evidence was not sufficiently probative to create an issue of fact on the pretext issue. The plaintiff has failed to persuade us that the district court was wrong in this decision.

In addition to the material that is usually submitted on a motion for summary judgment, the district court had the advantage of a bench trial on the request for permanent injunction. After that trial, which lasted several days, the court made findings of fact, denied the injunction, and entered a declaratory decree that the Hugheses, who had intervened, were entitled to become American Honda's Warner Robins dealer.

The district court properly held that the defendants could not prevail on this motion for summary judgment simply because of the outcome of that proceeding. The parties stipulated that the findings of fact would have no preclusive effect on a jury's deliberations. The court could

not take into consideration any facts then found which resolved disputed evidence. The court could, however, consider the record made at that time to determine whether there was sufficient evidence to present to the jury on the issue of pretext. Based on both the previous hearing and the evidence presented in this case, the district court concluded that the plaintiff had not demonstrated that the reasons Honda gave for denying Brown's application were pretextual.

Nondiscriminatory Rationales

[3] Honda advanced two reasons for its decision to grant the dealership in Warner Robins to the Hugheses. *First*, the Hugheses were existing Honda dealers with an excellent record and a familiarity with the company and its way of doing business. Honda's reasons for selecting Philip and Ashley Hughes were clearly legitimate and nondiscriminatory. It is not at all improper for an employer or a business contemplating a long-term association to prefer doing business with someone with whom they are familiar. The Hugheses had run what was by all accounts an exemplary business in Athens. They were familiar with the Honda product line, its distribution and warranty systems, and managerial approaches to sales tactics and advertising techniques. On that basis alone, Honda could legitimately encourage them to apply and thereafter select them to run the new dealership in Warner Robins. *McMillian v. Svetanoff*, 878 F.2d 186, 189 (7th Cir.1989) (employer's desire to hire someone with whom it was familiar was legitimate, nondiscriminatory basis for termination); *Holder v. City of Raleigh*, 867 F.2d 823, 825-26 (4th Cir.1989) (no discriminatory motivation when decision based on favoritism toward relatives even if reasons proffered were pretextual); *Waters v. Furnco*

Const. Corp., 688 F.2d 39, 40 (7th Cir. 1982) (hiring workers with whom employer is familiar is legitimate, nondiscriminatory rationale); *Aguirre-Molina v. New York State Division of Alcoholism and Alcohol Abuse*, 675 F.Supp. 53, 60 (N.D.N.Y.1987) (preference for individual's with an established record who are "known quantity" is legitimate basis for action).

[4] Although Brown questions whether the Honda system is really so complicated that an experienced dealer in another line would not be able to master it in short order, the court's responsibility was not to second guess the wisdom of Honda's reasoning, but to determine if the reasons given were merely a cover for a discriminatory intent. A contract may be granted "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as it [ ] is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir.1984) (citation omitted); *Mister v. Illinois Central Gulf R.R. Co.*, 832 F.2d 1427, 1435 (7th Cir.1987) (absence of "good reasons" does not justify a finding of pretext unless evidence suggests discriminatory intent).

Second, Honda alleges that it based part of its decision on the fact that the Hugheses were the only applicants proposing to sell only Hondas in Warner Robins. This, too, was a legitimate and nondiscriminatory justification for its decision. Honda could legitimately determine that a dealer that devotes its attention solely to the sale of Hondas would be preferable to one that attempted to sell several different car lines in the same geographic region. Not only would multiple lines distract the owner's managerial attention, but they would split the dealer's loyalties between the two or more lines. Even the plain-

tiff's expert admitted it would be preferable from the manufacturer's standpoint to have a dealer sell only one line in a geographic area.

Pretext

Plaintiff argues that he can prevail, however, if the reasons advanced by Honda are actually pretexts for an underlying discriminatory purpose, despite any facial appearance of neutrality. Initially, plaintiff notes that neither of the justifications espoused by Honda appear in Honda's own manual discussing the factors relevant to selecting new dealers. Oftentimes, departures from well established guidelines are indicative of attempts to conceal a discriminatory motive through the use of ad hoc criteria which allow the defendant to cloak a discriminatory intent in ostensibly neutral rationales. *See Gibralter v. City of New York*, 612 F.Supp. 125, 129 (E.D.N.Y.1985) (departures from normal procedures can supply evidence of discriminatory intent); *Blair v. Philadelphia Housing Authority*, 609 F.Supp. 276, 279 (E.D.Pa.1985) (same). This Court has concluded that selection processes which are conducted in an ad hoc or discretionary manner must be viewed with particular suspicion. *Fowler v. Blue Bell, Inc.* 737 F.2d 1007, 1011 (11th Cir. 1984). Brown suggests that Honda's deviation from its own manual clearly indicates that the reasons Honda put forth were pretextual.

What the plaintiff ignores, however, is that each of the practices complained of affected the two white candidates in precisely the same manner that they affected the plaintiff. Neither Butler nor Walters were existing dealers nor did their applications suggest that they planned on selling only Honda vehicles in Warner Robins. It is difficult to hold that a practice which affects applicants of all

races in the same manner is actually designed to conceal a racially discriminatory motive. *Giles v. Ireland*, 742 F.2d 1366, 1375-76 (11th Cir. 1984) (hiring criteria which affects both blacks and whites equally is not discriminatory); *Cannon v. Teamsters & Chauffeurs Union*, 657 F.2d 173, 176-77 (7th Cir.1981) (same).

Although Honda's expressed preference for existing dealers did not appear in the manual, Honda did demonstrate that 10 of the last 13 new sites were filled with existing dealers. Honda representatives in this corporate region have consistently demonstrated a preference for individuals with whom they are familiar and who have a working knowledge of the company. Nothing in the Honda manual implies that the factors listed are the only basis on which a decision can be made. The evidence supports the defendant's assertion that this criteria has not been used subjectively to accomplish an illegal purpose. *Conner v. Fort Gordon Bus Co.*, 761 F.2d 1495, 1499-1500 (11th Cir.1985) (failure to resort to written guidelines is not evidence of pretext); *Risher v. Aldridge*, 889 F.2d 592, 597 (5th Cir.1989) (agency's disregard for its own hiring system does not in itself demonstrate that nondiscriminatory explanation is pretextual). Departure from established procedures evident in this case is insufficient to support a conclusion of discriminatory intent. *See Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 528 (11th Cir.1983) (plaintiff must demonstrate that defendant departed from written guidelines in an effort to accomplish a discriminatory purpose).

[5] Plaintiff points out that out of approximately 860 Honda dealers nationwide only two are black. Statistical evidence is an appropriate method for demonstrating both a prima facie case of discrimination and pretext. *Mc-*

Donnell Douglas Corp. v. Green, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1258 (10th Cir.1988); *Tanner v. McCall*, 625 F.2d 1183, 1192-93 n. 16 (5th Cir.1980) (statistics can be used to show that defendant's asserted reasons for decision were a pretext); *Person v. J.S. Alberici Construction Co.*, 640 F.2d 916, 919 (8th Cir.1981) (statistics can be used to show discriminatory motive); *cf. Patterson*, 491 U.S. at 187-88, 109 S.Ct. at 2378-79, 105 L.Ed.2d at 157-58 (plaintiff is not to be limited in the manner used to show pretext).

Statistics such as these, however, without an analytic foundation, are virtually meaningless. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). To say that very few blacks have been selected by Honda does not say a great deal about Honda's practices unless we know how many blacks have applied and failed and compare that to the success rate of equally qualified white applicants.

Although the statistics themselves may be insufficient to demonstrate that the reasons espoused by Honda are not legitimate, they take on a slightly more ominous hue when viewed in conjunction with the criteria used by Honda in this case. In addition to there being only two black Honda dealers nationwide, there are none in this particular corporate region. Plaintiff suggests that a criteria which favors existing dealers under these circumstances is inherently discriminatory in that all existing dealers are white. Moreover, Honda does not disseminate information concerning new dealerships throughout the automobile industry generally, but instead uses a word of mouth system which the plaintiff contends gives yet another advantage to company insiders, all of whom are white.

[6] Were this a discriminatory impact case under Title VII, this argument, which maintains that factors or criteria which appear to be neutral actually have a discriminatory effect, might be controlling. Section 1981 requires specific proof of an intent to discriminate, however. Under this type of analysis it is not sufficient to show that the defendant was aware that the particular practice would have a discriminatory impact. Instead, the plaintiff must show that the defendant chose the policy for precisely this purpose. *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir.1988). There is no such evidence in this case.

Plaintiff argues his application and credentials were superior to those of the Hugheses. According to the plaintiff, his community contacts, net worth, proposed floor space, initial capital investment, and location presented a more favorable application package than that submitted by either the Hugheses or the other two candidates. *See Smith v. American Service Co. of Atlanta*, 611 F.Supp. 321, 328-29 (N.D.Ga.1984) (choice of a less qualified applicant can serve as evidence of discriminatory intent), *aff'd in part, vacated in part*, 796 F.2d 1430 (11th Cir.1986).

[7] Accepting plaintiff's conclusion that his application was superior to the Hugheses' in virtually every listed aspect does not compel a decision in plaintiff's favor. To rebut plaintiff's prima facie case, the defendant need not demonstrate that the individual or company selected was actually more qualified than the plaintiff, rather it must only show that it had a legitimate nondiscriminatory reason for its action. *Crawford v. Western Electric Co.*, 745 F.2d 1373, 1377 (11th Cir.1984). In any event, in this case, the fact that Honda had experience

with the Hugheses makes a point by point comparison of the applicants' credentials less useful.

Plaintiff suggests that his application was not taken seriously and that he was treated differently in the application process from the white candidates. *Nix*, 738 F.2d at 1186 (discriminatory intent can be shown through inconsistent or unequal treatment of similarly situated individuals); *McAlester*, 851 F.2d at 1256-59 (same). Plaintiff's primary contention is that despite repeated requests for additional information he was not given access to internal Honda data which would have been of substantial assistance in preparation of the application while the same information was given to two of the white candidates. Factual disputes about this issue do not control the summary judgment decision, however. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986) (emphasis in original). Plaintiff could not prevail unless he could show that but for his race, he would have received this Honda franchise. This Circuit has stated on numerous occasions that the *McDonnell Douglas-Burdine* test is merely a tool for analyzing cases in which there is no direct evidence of discrimination. *See, e.g., Grigsby*, 821 F.2d at 595 (citation omitted); *Nix*, 738 F.2d at 1184. The test, therefore, is not an end in itself, but is instead a means for sifting through the circumstantial evidence presented to determine if the defendant treated the plaintiff differently because of his race. The ultimate inquiry remains whether the plaintiff has demonstrated that the defendant *intentionally* discriminated in refusing to enter into a contractual relationship. *Grigsby*, 821 F.2d at 595.

The court is warranted in granting judgment to the defendant unless the plaintiff satisfies the ultimate burden of persuasion by demonstrating that the defendant relied on race in making its decision. *Nix*, 738 F.2d at 1184-85; *Clark*, 717 F.2d at 529.

A review of the record supports the decision that Honda selected the Hugheses not for any discriminatory purpose but because it knew them and had confidence in their abilities. Although the plaintiff has produced scattered pieces of circumstantial evidence, none of it, even taken as a whole, raises sufficient questions to undermine Honda's nondiscriminatory rationale.

Discovery Requests

[8] It does not appear that the district court erred in denying plaintiff's motion to reopen discovery. Nearly a year after discovery closed, plaintiff requested that the district court reopen discovery to allow plaintiff to make inquiries into an EEOC agreement with the manufacturing component of Honda's American operations (HAM Inc.). The EEOC had charged HAM Inc. in that complaint with maintaining discriminatory hiring and promotion practices.

HAM Inc., however, is a separate corporation which operates on the opposite end of the industry spectrum. Absent a showing of "particularized need and relevance" plaintiffs may not compel discovery from related corporations or even separate units of the same corporation. *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir.1978). The hiring practices used by a related subsidiary involved in production and located in Ohio are simply not relevant to the intent of a separate corporation in-

volved in sales and located in Georgia. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1084-85 (11th 1990).

[9] Neither does it appear that the district court erred in denying plaintiff's motion to compel production of information by the defendant concerning all blacks who had communicated an interest in becoming a Honda dealer, concerning all Honda officers who had been informed of the present suit, and concerning all governmental or private organizations that have complained of discriminatory practices to Honda in the past. These matters are generally consigned to the discretion of the district court. *Earley*, 907 F.2d at 1085 (denial of motion to compel nationwide discovery will only be reversed if it constitutes an abuse of discretion). The court was within its discretion in holding that the information sought was simply too broad. Unless it is clear that nationwide practices are relevant, discovery should be confined to the local units of a corporation. *Earley*, 907 F.2d at 1084.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY MAC BROWN,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
vs.	:	1:85-cv-1582-HTW
AMERICAN HONDA MOTOR CO., INC., and JERRY FELTY,	:	
	:	
Defendants	:	

MEMORANDUM OPINION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BACKGROUND

This matter is pending before the court on the motion of the defendants for summary judgment. Plaintiff Johnny Mac Brown ("plaintiff" or "Mr. Brown") is an unsuccessful applicant for a Honda automobile dealership in Warner Robins, Georgia. Plaintiff filed suit against defendants American Honda Motor Co., Inc. ("American Honda") and its then southeast zone sales manager, Jerry Felty ("Mr. Felty"), alleging that the failure of defendants to select him as a Honda automobile dealer was due to his race and, therefore, violated 42 U.S.C. § 1981.[1] Plaintiff is a

[1] In the original complaint, plaintiff also sought relief under the Thirteenth Amendment of the United States Constitution. This claim was dismissed by the order of March 27, 1985.

black person. The dealership sought by the plaintiff was in effect awarded to Phillip R. Hughes and Ashley D. Hughes, white males, when defendants granted to them a letter of intent. The Hugheses purchased land in Warner Robins, Georgia, and took steps to establish a dealership there. In his complaint, Mr. Brown sought damages and injunctive relief preventing defendants Honda and Felty from awarding the Warner Robins Honda automobile franchise to any person other than the plaintiff. After the suit was filed, and with the consent of the plaintiff and defendants, the court entered an order authorizing the intervention of Phillip R. Hughes, Ashley D. Hughes and Hughes Auto Sales, Inc., the corporation which they created, to own and operate the dealership ("the intervenors").

At the time of his application with Honda, plaintiff operated four dealerships in Warner Robins--Oldsmobile, Cadillac, Pontiac, and GM Trucks. Phillip Ashley was principal owner of Hughes Auto Sales in Athens, Georgia, which operated Honda and BMW dealerships. Ashley Hughes, brother of Phillip and minor stockholder in Hughes Auto Sales, planned to relocate to Warner Robins to serve as manager of the Honda dealership. The intervenors sought a declaratory judgment defining their rights under the letter of intent.

THE PRIOR TRIAL

Plaintiff's complaint sought both injunctive and monetary relief, alleging that defendants were guilty of intentional racial discrimination in the denial of the dealership to him, all in violation of the Constitution of the United States and 42 U.S.C. § 1981. Both plaintiff and defendants sought trial by jury. The intervenors opposed

plaintiff's application for injunctive relief and sought a declaratory judgment. The case was bifurcated for a separate trial on plaintiff's claim for injunctive relief and declaratory judgment. Plaintiff's claim of racial discrimination was directed at the defendants and not the intervenors.

The case came on for a bench trial, lasting several days. A full hearing was had on injunction issues and the merits of plaintiff's claim of racial discrimination. Plaintiff's request for a permanent injunction was denied and declaratory judgment was granted in favor of the intervenors.

In reaching a decision on plaintiff's racial discrimination claim, the court utilized the analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as modified in later cases. In its order, the court concluded that plaintiff had made out a *prima facie* case of racial discrimination, but further ruled that defendants had articulated legitimate nondiscriminatory reasons for their action. On page 23 of the Memorandum Opinion, dated March 27, 1986, the Court stated the following:

> In conclusion, the court is compelled to a determination that the evidence does not demonstrate that the defendants have discriminated against the plaintiff on the basis of race in the selection of the Intervenors, rather than the Plaintiff, to be the Honda dealer in Warner Robins, Georgia.

EFFECT OF AMENDMENT TO PRETRIAL ORDER

In one of plaintiff's responses, it was asserted that defendants are estopped from obtaining summary judgment by the amendment to the October 16, 1985 pretrial order entered on November 18, 1985. That amendment reads as follows:

> The right of the plaintiff and defendants to a trial by jury on all issues concerning the plaintiff's claim for damages is expressly preserved for a trail following the trial on plaintiff's claim for final injunctive relief and Intervenors' claim for a declaratory judgment. The parties stipulate that the Court's findings of facts and conclusions of law pertaining to the merits of plaintiff's claim under 42 U.S.C. § 1981 shall be binding with regard to the issues of permanent injunction and declaratory judgment, but shall have no preclusive effect on the jury's deliberations regarding the merits of plaintiff's claim for damages and shall not be admissible as evidence in the second trial.

Amendment to Pretrial Order entered November 18, 1985.

The language of the amendment and the hearing on this issue at the opening of trial shows that it was intended only to preserve issues for jury determination that would have reached the jury in the course of an ordinary trial. *See* Amendment to Pretrial Order entered November 18, 1985. The amendment states that the right to a jury trial "is expressly preserved" and that the court's findings of fact and conclusions of law on the issues of permanent injunction and declaratory judgment "shall have no

preclusive effect on the jury's deliberations." Nothing in the amendment (or in the hearing on the amendment) contemplates a waiver of defendants' right to summary judgment otherwise if shown to be appropriate.

MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment occupies an unusual procedural posture. The fact that it relies primarily upon the record of the prior trial rather than discovery materials is unusual in the court's experience. The current motion resulted from the court's granting of defendants' motion for leave to file the motion for summary judgment after the bench trial and prior to a pending jury trial on the issue of damages. Plaintiff opposed the motion for leave to file the motion.

It is clear to the court that defendants cannot prevail on the motion for summary judgment simply because the plaintiff was the losing party at the earlier trial on the injunctive relief and declaratory judgment issues. Although the court dealt with the plaintiff's claim of racial discrimination, defendants contend that they are entitled to summary judgment because the underlying record in the prior trial shows as a matter of law that plaintiff has no admissible evidence tending to show that defendants were guilty of racial discrimination in choosing the Hugheses over the plaintiff regarding the Warner Robins dealership. Defendants further assert that no discovery on the issues of liability has taken place since the prior bench trial, and that discovery since the bench trial has been limited to issues related to plaintiff's claims for damages.

Defendants argue that summary judgment is demanded in their favor under Fed.R.Civ.P. 56, as inter-

preted in the "*Celotex* trilogy" of cases, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The plaintiff strongly opposes the motion for summary judgment and contends that there are several matters raising genuine issues of material fact in the liability phase of the case. Plaintiff argues that at the very least there exists genuine issues of material fact as to whether the reasons given by defendants for not choosing plaintiff were pretextual.

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986); *Warrior Tombigbee Transportation Co., Inc. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed.R.Civ.P. 56(c). To determine if the moving party meets the burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion. *Carlin Communication*, 802 F.2d at 1356; *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 656 (11th Cir. 1983).

In what has been referred to as the "*Celotex* trilogy" of cases decided in 1986, the Supreme Court reemphasized the importance and propriety of summary judgments. In *Celotex*, the Supreme Court held that Rule 56 "mandates the entry of summary judgment, after adequate-time for discovery and upon motion, against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 106 S.Ct. at 2552-53. The Court further stated that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 2555.

In order to withstand defendants' motion for summary judgment, plaintiff must identify and produce specific evidence from which inferences may be drawn which would establish every essential element of his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Brown v. City of Clewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988). It has been held in some cases that disposition of summary judgment is ordinarily inappropriate with regard to discrimination claims, because they involve nebulous questions of motivation and intent. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987). However, in cases in which the evidence offered in justification of the challenged action is so compelling and strong as to overwhelm the inference of discrimination created by plaintiff's *prima facie* case, a grant of summary judgment is appropriate unless the plaintiff presents additional evidence of pretext. *Id.* "A plaintiff when faced with a motion for summary judgment cannot rely on attenuated possibilities that a jury would infer a

discriminatory motive, but rather must come forward with sufficient evidence to establish a *prima facie* case and respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact." *Pace v. Southern Ry. System*, 701 F.2d 1383, 1391 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983); *see Young v. General Foods Corp.*, 840 F.2d 825, 828-29 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 782 (1989). Of course, when considering a motion for summary judgment, the court must review the evidence and all factual inferences from that evidence in the light most favorable to the party opposing the motion.

Undisputed Facts

Four applications were submitted to American Honda by persons seeking to become the American Honda franchisee for Warner Robins, Georgia. They were submitted by (1) Johnny Mac Brown (the plaintiff in the above-styled action), (2) Phillip and Ashley Hughes, (3) Dan G. Walton, and (4) Billy B. Butler. All of the applications met American Honda's minimum requirements.

Johnny Mac Brown is black; Phillip and Ashley Highes, Dan G. Walter and Billy B. Butler are white.

Of the four applicants, only the Hugheses had prior experience in the sales and service of Honda automobiles. In the opinion of American Honda, the Hugheses' record in sales and service of Honda automobiles was excellent.

Of the four applicants, only the Hugheses' application showed that they would exclusively sell Honda automobiles in the Warner Robins market.

Phillip and Ashley Hughes were chosen by American Honda to receive the American Honda franchise in Warner Robins.

Legal Conclusions and Discussion

In order to obtain relief under § 1981, plaintiff must demonstrate by a preponderance of the evidence that defendants American Honda and Mr. Felty intentionally discriminated against him on the basis of his race. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Baldwin v. Virginia Board of Education*, 648 F.2d 950 (5th Cir. 1981); *Crawford v. Western Electric Company, Inc.*, 614 F.2d 1300 (5th Cir. 1980). Since the proof of motive or intent to discriminate is seldom shown by direct evidence; such proof may be shown by circumstantial evidence which is sufficient to allow the finder of fact to infer discriminatory motive. *McDonnell Douglas v. Green*, 411 U.S. 792, 802-4, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1092-95, 67 L.Ed.2d 207 (1981); *Perryman v. Johnson Products Co.*, 698 F.2d 1138 (11th Cir. 1983).

The analysis employed in cases brought under § 1981 is similar to that used in disparate treatment cases brought under Title VII of the Civil Rights Act of 1964. *McWilliams v. Escambia School County Board*, 658 F.2d 326 (5th Cir. 1981); *Reid v. Fruehauf Division, Fruehauf Corp.*, 28 FEP 622 (N.D.Ga. 1982); *see also Perryman, supra.*

In cases under § 1981 it is appropriate to allocate the burden of proof according to the analyses of the Supreme Court set forth in *McDonnell Douglas, supra; McWilliams v. Escambia County School Board, supra; T & S Services*

Associates, Inc. v. Crenson, 666 F.2d 722 (1st Cir. 1981). Using this formulation, the plaintiff must initially prove by a preponderance of the evidence a *prima facie* case of racial discrimination by the defendants. Second, if the plaintiff succeeds in proving a *prima facie* case, the burden shifts to the defendants to articulate a legitimate nondiscriminatory reason for taking the challenged action. This is a burden of production rather than one of persuasion. Finally, the plaintiff has the opportunity to prove by a preponderance of the evidence that the reasons offered by the defendants were not the true reasons, but a pretext for discrimination. *See Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. The *McDonnell Douglas* formulation can be modified to fit other factual situations such as this case involving the award of a contractual right. *See T & S Services Associates, Inc. v. Crenson, supra.* In that case, a disappointed bidder challenged the award of a contract. In reaching a decision in the case, the court utilized a modified version of the *McDonnell Douglas* guidelines as follows:

> [W]e believe that the present plaintiff, T & S, would prove its prima facie case by showing, by a preponderance of the evidence that (i) T & S is a minority-owned firm; (ii) T & S's bid met the specifications required of those competing for the contract; (iii) the T & S bid was significantly more advantageous to the Committee than the bid actually awarded, whether in terms of price or some other relevant factor; and (iv) the Committee selected another contractor.

Id. at 725.

This court utilized the guidelines set forth in *T & S Services Associated, Inc., supra,* in reaching a decision in the prior trial, and deems them to be applicable in reaching a determination of the issues raised in defendants' motion for summary judgment.

Upon a consideration of applicable law and evidence before the court as the same applies to issues raised, the court determines that genuine issues of material fact exist as to whether the plaintiff can establish a *prima facie* case of racial discrimination. The plaintiff is a member of a minority group, his proposal met the specifications required and the franchise agreement was awarded to white applicants.

The burden shifts to the defendants to articulate a legitimate nondiscriminatory reason for not selecting plaintiff's application. In this connection, the defendants presented evidence to show that they chose the intervenors over the plaintiff for two primary reasons. Defendants contend that both are legitimate and nondiscriminatory reasons. Defendants stated that the intervenors were chosen over the plaintiff because, in addition to meeting all minimum dealership requirements, the intervenors were proven Honda dealers with a good track record covering many years, and that the intervenors had agreed that they would market Honda automobiles exclusively in the Warner Robins area.

The plaintiff sought to establish at the prior trial, as shown by the record, that the articulated reasons given by defendants were a pretext for unlawful discrimination. He has further sought to do the same in his written presentation in opposition to defendants' motion for summary

judgment. *See* Plaintiff's Brief in Response to Defendants' Motion for Summary Judgment, pages 23-30.

In his brief, plaintiff asserts that the circumstantial evidence of the defendants' rejection of the plaintiff of a Warner Robins Honda dealership for racial reasons is substantial. The brief proceeded to outline many matters that were presented at the prior trial. Among the items set forth in the brief were: differences in treatment between plaintiff and the Hugheses, defendants' failure to seriously consider plaintiff's application, selection of a less qualified white applicant over a more qualified minority applicant, the policy or practice of defendants' regarding new dealerships, such as word-of-mouth information between existing Honda dealers about possible dealerships and in obtaining application.

Upon due consideration of the applicable law and evidence on the pretext issue, the court concludes that no genuine issue of material fact exists for determination by a trier of fact. Another factor which supports the court's conclusion on the pretext issue is the fact that the plaintiff was not the only applicant rejected for the Warner Robins dealership. Two white applicants with other dealerships in that area (Butler and Walton) were treated similarly to plaintiff by defendants in the handling and rejection of their applications.

The thrust of the court's ruling is that the plaintiff has not and cannot present sufficient probative evidence to survive defendants' motion on the pretext issue. The following language from the Sixth Circuit case is noteworthy:

> To withstand [defendants'] motion for summary judgment in a discrimination suit, the [plaintiff] must do more than establish a prima facie case and deny the credibility of the [defendants'] witnesses. The plaintiff must also offer specific and significantly probative evidence that the [defendants] alleged purpose is a pretext for discrimination.

Schuler v. Chronicle Broadcasting Co., 793 F.2d 1010, 1011 (9th Cir. 1986) (citation omitted).

In view of the foregoing, summary judgment will be entered in favor of the defendants and against the plaintiff.

SO ORDERED, this 24th day of April, 1990.

HORACE T. WARD
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-8487

D. C. DOCKET NO. 1:85-cv-1582-HTW

JOHNNY MAC BROWN,

Plaintiff-Appelant,

versus

AMERICAN HONDA
MOTOR COMPANY, INC.,
JERRY FELTY,

Defendants-Appellees,

PHILIP R. HUGHES,
ASHLEY D. HUGHES,
HUGHES AUTO
SALES, INC.,

Intervenors-Defendants.

Appeal from the United States District Court for the Northern District of Georgia

Before KRAVITCH and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 23, 1991
For the Court: Miguel J. Cortez, Clerk

By:_____
Deputy Clerk

ISSUED AS MANDATE: SEPT. 18, 1991

By:_____
Deputy Clerk

(2)

No. 91-803

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHNNY MAC BROWN,

Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.
and JERRY FELTY,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. Donald McCarthy
Counsel of Record for Respondents
LYON & LYON
611 West Sixth Street
Los Angeles, California 90017
213/489-1600

Dorothy Y. Kirkley
Ronald T. Coleman, Jr.
Counsel for Respondents
PAUL, HASTINGS, JANOFSKY
& WALKER
Forty-Second Floor
133 Peachtree Street, NE
Atlanta, Georgia 30303
404/588-9900

QUESTION PRESENTED

Did the District Court and Court of Appeals properly apply well-established summary judgment principles in granting and affirming summary judgment against Petitioner based on the determination that the evidence permitted no reasonable inference that Respondents intentionally discriminated against Petitioner on the basis of his race in refusing to award him a Honda dealership?

PARTIES TO THE PROCEEDING

The caption contains the names of all current parties to this proceeding. Philip Hughes and Ashley Hughes formally intervened in the District Court; however, they are no longer parties to this action.

Pursuant to Supreme Court Rule 29.1, the following is a list of all parent companies and subsidiaries (except wholly-owned subsidiaries) of Respondent American Honda Motor Co., Inc.:

1. Honda Motor Co., Ltd.
2. Honda of America Mfg., Inc.
3. KTH Parts Industries, Inc.
4. Honda International Trading Corp.
5. Bellemar Parts Industries, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents American Honda Motor Co., Inc. ("American Honda") and Jerry Felty hereby submit this Brief in Opposition to Petitioner Johnny Mac Brown's Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and, for the reasons set forth herein, respectfully pray that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 939 F.2d 946 (11th Cir. 1991).

The decision of the United States District Court for the Northern District of Georgia is unreported. Copies of both decisions are attached as Appendix A and B, respectively, to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner Johnny Mac Brown ("Petitioner" or "Brown") contends that this case involves an unresolved and difficult issue of the proper application of summary judgment principles to a civil rights case requiring proof of discriminatory intent. To the contrary, this case involves nothing more than the application of well-established rules, already fully explored and articulated by this Court, regarding both the analytical framework for examining evidence on the issue of discriminatory intent and the resolution of summary judgment motions. The Court of Appeals' affirmance of the District Court's decision is not "part of a trend toward a more liberal use of the summary judgment procedure," Petition at 3; it merely constitutes the proper use of that procedure where the evidence is not sufficient to create a genuine issue of material fact that Respondents intentionally discriminated against Petitioner on the basis of his race.

This Court has recently issued a series of comprehensive opinions on the law governing summary judgment motions. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574 (1986).

Similarly, the three-step framework for analyzing evidence on the issue of discriminatory intent under 42 U.S.C. § 1981 (1988) is also well-established. *See Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Thus, this case presents no novel or complex issue warranting the issuance of a writ of certiorari.

II. STATEMENT OF FACTS

This lawsuit arises out of American Honda's selection of a candidate other than Petitioner for a new Honda automobile dealership in the Warner Robins, Georgia area. Petitioner, a black person, was one of four applicants for the prospective Warner Robins dealership. At the time of his application, Petitioner already operated a dealership in Warner Robins carrying four General Motors lines of vehicles—Oldsmobile, Cadillac, Pontiac, and GMC Trucks. (R7-38).

In response to Petitioner's previous inquiry, American Honda informed Petitioner of the Warner Robins "open point" and solicited his dealership application. (R12-6 to 13). Wes Jennings, American Honda's new district sales manager for the Warner Robins area and the employee responsible for contacting prospective local applicants, knew Petitioner was black through his previous employment with General Motors. (R12-4). Jennings also contacted two other applicants who owned existing car dealerships in the Warner Robins area, Dan Walton and Billy Butler. (R12-12 to 13; Defendants' Exhibit ("DEX") 54). Walton and Butler were white. While in Warner

Robins, Jennings met separately with Petitioner, Walton, and Butler to discuss their interest in a Honda dealership and to encourage each one to present a proposal for a new Honda dealership. (R12-9 to 13).

In addition to the three Warner Robins applicants, Philip and Ashley Hughes became aware of the Warner Robins open point through other channels. The Hughes owned and operated an existing Honda dealership in Athens, Georgia. (R8-28; R-12-83 to 85). The Hughes, however, were much more than just existing Honda dealers with whom American Honda had prior experience—they were outstanding dealers who had an exemplary track record in sales and service. (R9-120; R11-136 to 143, 147 to 148, 164; DEX 61-63, 69, 72). For example, the Hughes received the Honda Quality Dealer Award in 1977, 1979, and 1981, and ranked second in their district and fourth in their zone (out of 103 dealers) in the 1984 J.D. Power Dealer Image Survey. Thus, the Hughes were proven performers with valuable experience and skills in building and maintaining a Honda dealership.

In late September and early October of 1984, all four applicants submitted applications for the Warner Robins open point. (DEX 3, 4, 22, 31, 43). All four applicants met the minimum financial and facility requirements for a Honda dealership, including floor space, minimum floor plan financing, minimum capital investment, etc. (*Id.*). The Hughes' application stood out, however, based on their proven record of success as a Honda dealer. Further, only the Hughes

intended to sell exclusively Honda automobiles at the Warner Robins dealership, as Petitioner, Walton, and Butler all proposed to continue selling their existing lines. (R11-94, 131; DEX 53).[1/] Petitioner attempts to make out a case for intentional discrimination by pointing to the fact that the Hughes acquired certain information from American Honda regarding minimum dealer requirements while such information was not provided to him. Petitioner ignores, however, the fact that the two white Warner Robins dealers did not have this information either. Moreover, this information related to *minimum* dealer requirements, and Petitioner's application admittedly exceeded American Honda's minimum requirements.[2/]

Respondents seriously considered each candidate's application. Jennings discussed all three Warner Robins applicants, including Petitioner, with American Honda's assistant zone manager before the assistant manager and

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1/ Although Plaintiff asserts that there is no evidence that the Hughes made any "commitment" to sell only Honda automobiles in the Warner Robins area, the undisputed fact remains that the Hughes were the only applicants who did not sell other automobile lines in that area. By contrast, American Honda knew that Petitioner and the other white applicants intended to continue operating their existing dealerships.

2/ Although Petitioner contends that he requested such information from American Honda representatives, Petition at 5, he provides no record cite supporting this contention, and Respondents are not aware of any evidence to this effect. Further, Petitioner fails to point out that American Honda responded to a request for information by his accountant and assisted him in completing one of the forms for Petitioner's application. This request was the only specific help Petitioner sought from American Honda. (R7-133 to 135).

Respondent Felty made their recommendation. (R10-182 to 184, R12-47 to 48). Regarding Petitioner, Jennings told Felty that Petitioner's facilities were cluttered and that he had many other automobile franchises. (R9-13). Felty reviewed all the applications except Butler's prior to making a decision to recommend the Hughes for the Warner Robins open point. (R10-178, R11-106, DEX 52). American Honda did not interview any of the four applicants after receiving their applications; therefore, Petitioner's allegation that American Honda deviated from alleged Company practices by not interviewing him raises no inference of intentional racial discrimination.

In recommending the Hughes for the new dealership, Felty and his assistant zone manager emphasized the Hughes' proven excellent performance as a Honda dealer, their well-established record of customer satisfaction, and Philip Hughes' activity on the Honda Dealer Council, among other things. (DEX 52, 53). In a subsequent memorandum to American Honda's national sales manager, Felty re-emphasized the importance of the Hughes' proven track record as a Honda dealer and also expressed concern that because the other three applicants carried other lines of automobiles, they might suffer reduced management effectiveness. (DEX 53). Significantly, this memorandum criticizes Petitioner and the white Warner Robins applicants on the same basis. The fact that American Honda's national sales manager never saw Petitioner's application before awarding the dealership to the Hughes is not significant, as he testified that he ordinarily only reviews the application

of the person recommended by the zone manager. (R9-171 to 173). Moreover, this fact cannot be evidence of racial discrimination against Petitioner because the national sales manager did not see the applications of either Walton or Butler prior to making his decision. (*Id.*).

For obviously reasonable and legitimate business reasons, American Honda preferred to fill its new dealerships with existing dealers who have proven records of success in selling and servicing Honda automobiles. Petitioner's attempt to show this reason was merely a pretext for discrimination because it does not appear in American Honda's manual is both unavailing and belied by undisputed evidence in the record. Contrary to Petitioner's implication, the manual was merely a guideline for zone managers to use in filling new dealerships, and it obviously did not preclude American Honda from considering other relevant business factors. (R8-145). Moreover, American Honda filled ten of the last 13 open points in Felty's zone (up to and including the Warner Robins dealership) with existing Honda dealers. (R11-97 to 100, DEX 73). American Honda's established preference for applicants with proven track records as Honda dealers is unrelated to the race of the applicants, and was applied to Petitioner and the other two unsuccessful applicants in the same manner it was applied to groups of all white applicants.[3/]

3/ Petitioner was the only black applicant for these thirteen open points. (R9-4 to 5).

Finally, Petitioner has injected misleading and irrelevant matters regarding the alleged "entirely white landscape" of American Honda.[4/] As noted by the Eleventh Circuit, under this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), Petitioner's bare statistics "without an analytical foundation, are virtually meaningless." *Brown*, 939 F.2d at 952. Moreover, while such statistics may be relevant in a disparate impact case, they are not relevant at all to the section 1981 analysis which requires proof of a specific intent to discriminate against the Plaintiff. *Id.*

III. PROCEEDINGS BELOW

Petitioner brought suit against Respondents on February 14, 1985, seeking injunctive relief and damages under 42 U.S.C. § 1981 (1988). The Honorable Horace Ward of the Northern District of Georgia presided over a six-day plenary trial in November of 1985 on the injunction and declaratory judgment issues, during which Petitioner offered all of his evidence on liability under section 1981. After considering this evidence, Judge Ward denied Petitioner's request for a permanent injunction and granted the Hughes' request as intervenors for a declaratory judgment that the Hughes, rather than Petitioner, were entitled to the Warner Robins dealership. (R4-81).

4/ Petitioner is patently incorrect when he alleges that American Honda discriminated against Gregory Baranco in his attempt to obtain a Honda dealership in another part of Georgia. The evidence is undisputed that Baranco contacted American Honda only by letter and by telephone, and never informed anyone at American Honda that he was black. (R7-201 to 204, 212).

Discovery continued on the damages issues, and on March 18, 1988, Respondents filed their Motion for Summary Judgment on all remaining claims. On April 24, 1990, Judge Ward granted this Motion and entered final judgment for Respondents. (R4-119, 120). Petitioner then appealed to the Eleventh Circuit, which affirmed Judge Ward's decision. Contrary to Petitioner's characterization, the Court of Appeals did not selectively weigh the evidence, but properly examined the record for any reasonable inference that American Honda intentionally discriminated against Petitioner because of his race. Finding no evidence that would support such an inference, the Court of Appeals properly affirmed the granting of summary judgment.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THIS COURT DOES NOT NEED TO ELABORATE FURTHER ON THE PROPER STANDARDS FOR GRANTING SUMMARY JUDGMENT IN CASES INVOLVING DISCRIMINATORY INTENT

Petitioner attempts to characterize this case as raising a novel issue regarding the proper application of summary judgment principles with respect to which this Court needs to provide guidance to the lower courts. This case, however, merely involves the routine application of summary judgment principles recently clarified by this Court to the well-established framework of determining discriminatory intent in a section 1981 case. The Court of Appeals rejected the same argument thusly: "Although the plaintiff asserts that this case is important to the developing law of discrimination claims under section 1981, we believe the case involves nothing more

than the application of established law, about which the parties do not disagree, to the individual facts of this case." 939 F.2d at 948. Because this Court's opinions provide lucid and thorough guidance on the proper resolution of summary judgment motions, this Court's valuable time can be better occupied with other matters.

This Court's recent decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), plainly set forth the standard for deciding a motion for summary judgment. In *Anderson*, this Court noted that Fed. R. Civ. P. 56(c) "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no *genuine* issue of *material* fact." 477 U.S. at 247-48 (emphasis in original). This Court further noted that the "materiality" and "genuineness" of a factual dispute are distinct concepts. As to materiality, factual disputes that are irrelevant or insignificant under the controlling substantive law cannot defeat summary judgment. *Id.* at 248. For a factual dispute to be genuine, the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The focus of this prong of the summary judgment inquiry is whether the evidence is "significantly probative" so as to require a trial. *Id.* at 249-50.

This Court in *Anderson* further explained that the summary judgment standard "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Id.* at 250. The direct analogy between the standards for summary judgment and directed verdict belies Petitioner's contention that the *Anderson* decision created "confusion" as to the proper scope of the district court's function in deciding a motion for summary judgment. District courts apply the "reasonable jury" standard in deciding directed verdict motions in virtually every case. Therefore, they obviously can apply the same standard in deciding a motion for summary judgment. While Petitioner may complain about the application of the summary judgment standard in this case,[5/] there is nothing inconsistent or confusing in the *Anderson* decision which would require further clarification by this Court.

Contrary to Petitioner's argument, the *Anderson* opinion is neither contradictory nor confusing. *See* Petition at 19-20. In stating that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party," *id.* at 249, the *Anderson* court obviously meant the "reasonable jury" standard applied on directed verdict motions. Petitioner confuses the concept of the sufficiency of the evidence with the threshold inquiry of

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5/ However, as shown in Part II, *infra*, the District Court and Court of Appeals correctly applied these standards in granting summary judgment to Respondents.

whether the nonmovants' evidence is minimally sufficient that a reasonable jury could return a verdict in its favor. The Court's function is merely to make that threshold inquiry—exactly the same function a-district court regularly performs at the directed verdict stage. Petitioner's melodramatic assertion that the *Anderson* holding would entirely negate the need for juries in civil cases ignores the close relationship between the summary judgment and directed verdict standards, and substitutes rhetoric for reasoning.

The standards set by this Court in *Anderson, Celotex,* and *Matsushita* are not ambiguous or susceptible to an overly broad application. In tying the summary judgment standard to that for a directed verdict, this Court gave district courts a clear and familiar standard to apply in deciding summary judgment motions. Because this standard does not need further elaboration or clarification, Respondents respectfully submit that the Petition for Certiorari should be denied.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT PETITIONER'S EVIDENCE ALLOWED NO REASONABLE INFERENCE OF INTENTIONAL DISCRIMINATION AND THUS PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS

Even viewed in the light most favorable to Petitioner, his evidence presented to the District Court raises no inference that Respondents intentionally discriminated against him on the basis of his race. The evidence reveals that throughout the application process, Respondents treated Petitioner exactly the same as Walton and Butler, the white Warner Robins

applicants. Further, Petitioner never rebutted American Honda's legitimate and nondiscriminatory reasons for choosing the Hughes, *i.e.*, that the Hughes were existing Honda dealers with an excellent performance record and that the Hughes were the only applicants who would be selling only Honda automobiles in Warner Robins. The inferences urged by Petitioner create neither a material nor a genuine issue of fact as to whether Respondents intentionally discriminated against Petitioner because of race. The lower courts therefore properly granted summary judgment to Respondents.

Petitioner failed to show the existence of a *material* issue of fact because none of his evidence supports a reasonable inference that Respondents intentionally discriminated against him because of his race. Any alleged deviations by American Honda from the manual clearly affected the white Warner Robins' applicants in the same manner as they affected Brown. *See Giles v. Ireland*, 742 F.2d 1366, 1375-76 (11th Cir. 1984) (plaintiffs could not establish discrimination claim when challenged practice affected both blacks and whites in the same manner). The vast majority of Petitioner's allegations which he contends support a reasonable inference of intentional discrimination apply with equal force to Walton and Butler, such as his allegations that American Honda failed to interview him, failed to contact any of his local references, failed to provide him with the same information provided to the Hughes, had a different manager handle his application than the one who handled the Hughes' application, and the fact that American Honda's national sales manager did not review his

application prior to issuing the letter of intent to the Hughes. This evidence plainly establishes that any alleged disparity in treatment between Petitioner and the Hughes was not the result of intentional racial discrimination by Respondents.[6/]

Moreover, Petitioner presented no evidence that American Honda's legitimate, nondiscriminatory reasons for choosing the Hughes were merely a pretext for racial discrimination. The mere fact that the manual does not expressly state a preference for existing Honda dealers does not mean that American Honda is precluded from considering such an obviously legitimate and compelling factor.[7/] American Honda had consistently applied this factor in filling 10 of the last 13 open points in Felty's zone with applicants who were existing Honda dealers. Petitioner thus has not raised any inference of intentional racial discrimination from American Honda's consistent application of this reasonable business practice.

Further, there is no support in the record in the record for Petitioner's assertion that there was "conflicting evidence" as to whether the Hughes would be selling exclusively Honda automobiles in the Warner Robins area. Their application

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6/ As discussed above, Petitioner's allegations regarding the number of black Honda dealers, American Honda's system of announcing new dealerships, and alleged evidence that American Honda discriminated against another black dealer are completely irrelevant to whether American Honda intentionally discriminated against Petitioner. *See supra*, at 8 & n.4.

7/ In fact, Petitioner's own expert witness admitted that it is a good business practice to recommend a person that is a proven, successful commodity and who would maintain an exclusive dealership. (R10-60 to 61, 69 to 74, 77 to 81).

discussed only a Honda sales and service operation, and they did not already sell any other car lines in Warner Robins. The other three applicants had other dealerships there. Only the Hughes offered this substantial benefit to American Honda. The "exclusivity" issue thus does not relate to racial discrimination.

Finally, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), is not at all similar to the present case and does not support Petitioner's argument that summary judgment was improperly granted here. In *Adickes*, the circumstantial evidence permitted a reasonable inference of a conspiracy because of the consistent actions of the two persons involved. In the present case, however, the evidence permits no reasonable inference of intentional racial discrimination because the conduct of which Petitioner complains affected the white Warner Robins applicants in the same way as it affected him. The circumstantial evidence proffered by Petitioner is simply insufficient to establish a genuine issue of material fact under the substantive law applicable to this section 1981 action.

CONCLUSION

This Court has articulated clear and comprehensive guidance for the proper resolution of summary judgment motions. The "reasonable jury" standard discussed in *Anderson* mirrors the standard for a directed verdict under Rule 50(a), a standard which district courts regularly apply and with which they are intimately familiar. The issue raised by Petitioner therefore is not a novel or unsettled one which requires the

attention of this Court. Moreover, the lower courts in the present case properly applied the law in granting summary judgment to Respondents. Petitioner has not presented any evidence which supports a reasonable inference that Respondents discriminated against him on the basis of his race in not awarding him the Warner Robins dealership. In fact, the undisputed evidence establishes that American Honda treated Petitioner throughout the application process just the same as it treated the other disappointed white applicants.

For these reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

J. Donald McCarthy
Counsel of Record for Respondents
LYON & LYON
611 West Sixth Street
Los Angeles, CA 90017
213/489-1600

Dorothy Y. Kirkley
Ronald T. Coleman, Jr.
Counsel for Respondents
PAUL, HASTINGS, JANOFSKY
& WALKER
Forty-Second Floor
133 Peachtree Street, NE
Atlanta, Georgia 30303
404/588-9900

Attorneys for Respondents
American Honda Motor Company, Inc. and
Jerry Felty